No. 76-1040

In the Supreme Court of the United States

OCTOBER TERM, 1977

THOMAS SANABRIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 548 F. 2d 1. The district court did not write an opinion.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 1976 (Pet. App. 13a). The petition for a writ of certiorari was filed on January 29, 1977,[1]

[1] The petition was one day out of time under Rule 22(2) of the Rules of this Court.

and was granted on June 27, 1977. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Criminal Appeals Act authorized the United States to appeal in the circumstances of this case.

2. Whether the Double Jeopardy Clause prohibits a second trial after a district court enters a mid-trial order at the defendant's request discharging him because of a supposed defect in the indictment that the defendant did not draw to the court's attention until after jeopardy had attached.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part:

> * * * [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb * * *.

2. 18 U.S.C. 3731 provides in relevant part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> * * * * *
>
> The provisions of this section shall be liberally construed to effectuate its purposes.

STATEMENT

1. Petitioner and ten co-defendants were tried before a jury in the United States District Court for the District of Massachusetts on a one-count indictment charging that they conducted (Pet. App. 16a)

> an illegal gambling business, to wit, accepting, recording and registering bets and wagers on a parimutual number pool and on the result of a trial and contest of skill, speed, and endurance of beast, said illegal gambling business; (i) was a violation of the laws of the Commonwealth of Massachusetts, to wit, M.G.L.A. Chapter 271, Section 17, in which place said gambling business was being conducted; (ii) involved five and more persons who conducted, financed, managed, supervised, directed and owned all and a part of said business; (iii) had been in substantially continuous operation for a period in excess of thirty days and had a gross revenue of two thousand dollars ($2,000) in any single day; all in violation of Title 18, United States Code, Sections 1955 and 2.

The evidence adduced at trial showed that all defendants were involved in an illegal numbers and horse betting gambling business in Revere, Massachusetts. The operation was broken up when agents of the Federal Bureau of Investigation raided three of the business's locations and seized betting records.

At the close of the government's case on the sixth day of trial, all 11 defendants moved for judgments of acquittal. Counsel for petitioner argued in part that accepting and recording bets and wagers on a parimu-

tuel numbers pool was made a crime not by Mass. Gen. L., ch. 271, Section 17 (1968) (as the indictment had specified) but by Section 7 of that same chapter (A. 5–6). Petitioner had not raised this contention before trial (although pretrial proceedings had consumed three years (Pet. App. 2a)), nor had he raised it earlier during the trial (*id.* at 3a).

The district court denied the motions to acquit, and it also denied a motion to strike evidence pertaining to the numbers pool theory of liability (A. 6–12). The court found that numbers pool betting was prohibited by Section 17 of the state statute.

After one of petitioner's co-defendants presented a witness and another a stipulation, all of the defendants rested. The defendants, including petitioner, renewed their motions for judgments of acquittal, and the district court denied them again (A. 12).

During a brief recess the district court read a state case (*Commonwealth* v. *Boyle,* 346 Mass 1, 189 N.E. 2d 844) that implied that "Section 17 does not include the numbers aspect" of the charge (A. 12–13). On this reasoning the court struck "so much of the evidence in the case as ha[d] to do with numbers betting" (A. 13), but held that the case would be submitted to the jury on the theory that the defendants conducted and operated a business that illegally accepted bets on horse races.

The prosecutor told the court that petitioner had been connected to the business solely through the numbers evidence, and the court then granted petitioner's motion for a judgment of acquittal (A. 16–20). The court recessed the trial so that the parties

could reassess the evidence and arguments in light of its unexpected ruling (A. 20–22).

At the resumption of trial the next day, the prosecutor filed motions requesting the court to reconsider the judgment of acquittal, to reconsider the ruling striking the evidence of the numbers aspect of the business, and to permit the government to amend the indictment (A. 23–36). The motions argued that the mis-citation of the state statute had not prejudiced the defendants, since the indictment fully set out the elements of the offense.

The court expressed concern that petitioner had not raised before trial the issue of the defect in the indictment. The court asked petitioner's counsel to explain how petitioner had been prejudiced by the error. Counsel replied (A. 43), "I don't think I have to allege prejudice." Counsel explained that he had delayed making his motion because it "did not ripen until such time as the Court was asked to take judicial notice of the statute. If the Court had been asked at the beginning of the trial, I planned to raise it then" (A. 44).

Despite counsel's unwillingness to assert prejudice to his client, and despite the admission that counsel had delayed raising an objection to a known defect in the indictment, the district court, stating that it was acting "with considerable reluctance * * * in view of the posture of the case," denied the prosecutor's motions because "the question of identification of the crime charged is such a basic one in the criminal law" (A. 48). The court indicated that its acquittal of peti-

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tioner rested entirely upon its perception that the indictment was defective on its face (A. 48–49).[2]

The court then submitted the case against petitioner's ten co-defendants to the jury solely on the theory that they conducted and operated a gambling business that illegally accepted wagers on horse races. The jury found all ten guilty.[3]

2. The government appealed the disposition of petitioner's case, and the court of appeals reversed. It held that a second trial of petitioner on the numbers aspect of the indictment would not violate the Double Jeopardy Clause because petitioner had requested the termination of the prosecution and had surrendered his valued right to receive the verdict of the jury on the numbers theory of liability. The court of appeals explained (Pet. App. 11a):

> Since [petitioner] voluntarily requested termination of proceedings based upon the numbers activities before there had been any determinations regarding either his conduct or its legal consequences, and since there can be no suggestion that [petitioner's] request was attributable to developments resulting from prosecutorial or judicial overreaching, we hold that there is no double jeopardy bar to a future prosecution on this cause.

[2] It also stated that it would have set aside the judgment of acquittal if it had granted the motion to amend the indictment or to reinstate the evidence (A. 49).

[3] The ten defendants appealed and argued that evidence against them had been based on an illegal wire interception. The court of appeals held that nine of them lacked standing, and it affirmed their convictions. It remanded for a "taint" hearing concerning the tenth defendant. *United States* v. *Plotkin*, 550 F. 2d 693 (C.A. 1).

The court of appeals also held that the Criminal Appeals Act authorizes the United States to appeal in this case. It reasoned that the district court's action "eliminated one basis for imposing criminal liability" (Pet. App. 5a) on respondent, and that Congress intended to permit review of all such decisions once they were embodied in a final order (*id.* at 6a–7a).

Finally, the court concluded that the district court should have allowed the case against petitioner to be submitted to the jury because the mis-citation of the state statute was not prejudicial. Relying upon *United States* v. *Morrison*, 531 F. 2d 1089, 1094 (C.A. 1), certiorari denied, 429 U.S. 837, which had held that the citation of Section 17 rather than Section 7 of the Massachusetts statute does not make a federal indictment insufficient, the court of appeals remanded for a second trial (Pet. App. 4a, 12a). This trial, it ruled, is to be confined to the "numbers" aspect of the charge in light of the prosecution's failure at the first trial to connect petitioner to the horse betting aspect of the gambling operation.[4]

3. This Court granted the petition for a writ of certiorari on June 27, 1977, limited to the first three questions presented. The limited grant of review removes from the case any question concerning the adequacy of the indictment to state an offense, and we therefore proceed on the assumption that the district court erred in terminating the prosecution of petitioner.

[4] The United States did not seek a second trial on the horse betting aspect of the charge.

SUMMARY OF ARGUMENT

I

The Criminal Appeals Act, 18 U.S.C. 3731, authorizes the United States to appeal from any final order in a criminal case. "Congress intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit." *United States* v. *Wilson,* 420 U.S. 332, 337.

Petitioner was indicted for a federal gambling offense in a single count containing two discrete theories of liability—numbers betting and horse race wagering. Because of what it thought to be a technical deficiency in the indictment, the district court in effect dismissed the portion of the count predicated on the numbers theory; it acquitted petitioner on the horse betting theory, which the prosecution had not proved as to him.

The Criminal Appeals Act, which is to be "liberally construed to effectuate its purposes," permits an appeal that pertains only to a portion of a count when the dismissal of the portion precludes the government from proving the offense under what an appellate court may find to be a valid charge. After all, since every discrete theory of liability could be embodied in a separate count, it is fortuitous (so far as both petitioner and the purposes of the statute are concerned) that both theories may in a particular case have been combined in a single count. If the prosecution could appeal only from dismissals of entire counts, it could simply obtain a separate indictment (charging each

theory in a separate count) and then appeal. That would be a pointless formalism, and the court of appeals therefore correctly held that the statute authorizes appeals that pertain to any discrete theory of liability within a single count. Accord, *United States* v. *Alberti,* C.A. 2, No. 76–1543, decided August 24, 1977.

II

A. The Double Jeopardy Clause forbids a second trial after a defendant has been acquitted on the general issue at the first trial (at least in the absence of a finding of guilt preceding the acquittal). Compare *United States* v. *Martin Linen Supply Co.,* No. 76–120, decided April 4, 1977, with *United States* v. *Sanford,* 429 U.S. 14. But in the absence of a true acquittal, the Court has avoided the creation of any rigid rule that would bar reprosecution. "The determination to allow reprosecution in [some] circumstances reflects the judgment that the defendant's double jeopardy interests, however defined, do not go so far as to compel society to so mobilize its decision-making resources that it will be prepared to assure the defendant a single proceeding free from harmful governmental or judicial error." *United States* v. *Jorn,* 400 U.S. 470, 484 (plurality opinion).

When, during the course of a trial, an accused willingly surrenders his right to receive a verdict, this choice ordinarily removes any barrier to a second trial. *Lee* v. *United States,* No. 76–5187, decided June 13, 1977; *United States* v. *Dinitz,* 424 U.S. 600. Here petitioner, by persuading the court that the indictment

was defective on its face, willingly surrendered the right to receive the verdict of the jury. This case therefore is controlled by *Lee*.

In both this case and *Lee* the defendant argued, in mid-trial, that the indictment was defective. In both cases the court agreed and terminated the proceedings without resolving any disputed issues of fact or ruling that the defendant could not have been convicted under a proper indictment. Although the court in the present case called the termination an "acquittal," that is not dispositive, since it was, in substance, only a conclusion that the indictment was defective. Substance, not labels, determines the double jeopardy consequences of a court's action.

B. This case is arguably distinguishable from *Lee*, however, because at the same time the district court held that the indictment did not properly charge a gambling offense involving numbers, which is what the prosecution's proof had shown, it also held that the proof was insufficient to show that petitioner participated in a gambling ring involving horse betting. Petitioner contends that because numbers operations and horse betting were simply two aspects of the same gambling offense, the district court has passed upon the general issue and acquitted him.

We agree with petitioner that, in the circumstances of this case, numbers operations and horse betting operations were simply two components of the same offense—operating a gambling business. But each discrete theory of criminal liability could have been

the basis of a separate count of the indictment. If petitioner had been charged in two counts with (1) conducting a horse betting gambling ring, and (2) conducting a numbers betting gambling ring, the proper resolution of this case would be apparent. The district court would have entered two separate judgments, one acquitting petitioner of the horse betting offense and the other dismissing the numbers indictment because it was defective on its face. A second trial of the numbers charge then would have been permitted under *Lee*. Since none of petitioner's legitimate double jeopardy interests are affected by whether the indictment was in one count or two, it follows that *Lee* supports the propriety of a second trial .

Even on the assumption that a two-count indictment would have been improper, a second trial still is permissible because petitioner rather than the prosecutor was responsible for "splitting" the charge into two components. Petitioner persuaded the district court that the single count failed effectively to charge both the horse betting and numbers theories of liability and that the indictment charged one but not the other. He persuaded the district court, in other words, to treat the case as if there were two separate charges, and to dismiss the numbers charge on a ground unrelated to his guilt or innocence. The prosecutor attempted to obtain a final resolution on all theories at the same trial, but petitioner resisted, and "his action deprived him of any right that he might have had against consecutive trials" (*Jeffers* v.

United States, No. 75–1805, decided June 16, 1977, plurality slip op. 16).

C. Petitioner's failure to raise his objection to the indictment before trial provides an additional reason to conclude that the Double Jeopardy Clause does not bar a second trial. Only petitioner's delay in presenting to the district court a known "defect" in the indictment is responsible for the need to hold two trials here. Petitioner easily could have pointed out the statutory mis-citation before trial, and the prosecutor then either could have obtained an amended indictment or argued (as the court of appeals held was correct that the mis-citation was immaterial. Alternatively, an adverse ruling by the district court could have been appealed and the matter resolved in that fashion before petitioner was ever placed in jeopardy. Either way, any problem could have been corrected before trial.

The attachment of jeopardy before resolution of petitioner's objections to the indictment was unnecessary. We submit that the Double Jeopardy Clause does not bar a second trial when the defendant subjects himself to an unnecessary jeopardy. There is no reason why a clever defendant should be allowed to transmute a drafting error (or his ability to persuade a district court that there is a drafting error) into immunity from prosecution merely by delay in calling the problem to the court's attention. The Double Jeopardy Clause is designed to protect defendants from repetitious prosecutions sought by the govern-

ment; it is not intended to give the defendant a chance to subject himself to an unnecessary jeopardy as part of a stratagem to avoid prosecution altogether. A defendant has no legitimate reason to keep the knowledge of a defect in an indictment to himself until after jeopardy has attached, and the fact that he subjects himself to an unnecessary jeopardy by doing so therefore should not give rise to a double jeopardy objection to a second trial on a proper charge.[5]

ARGUMENT

I

THE CRIMINAL APPEALS ACT AUTHORIZES A PROSECUTION APPEAL FROM ANY FINAL ADVERSE ORDER ENTERED IN A CRIMINAL CASE, SO LONG AS THE DOUBLE JEOPARDY CLAUSE DOES NOT FORECLOSE FURTHER PROCEEDINGS

The first question in any appeal by the United States is whether that appeal is authorized by statute. *United States* v. *Wilson,* 420 U.S. 332, 336. Petitioner contends that the appeal in the present case was not authorized by the Criminal Appeals Act, 18 U.S.C. 3731. This is so, petitioner maintains, because the district court's ruling was essentially an evidentiary ruling and also because the statute does not authorize an appeal from the dismissal of part of a count of an indictment.

These arguments do not take adequate account of Congress's purposes in enacting the Criminal Appeals

[5] The injury to the ends of public justice from sustaining a double jeopardy claim in such circumstances is particularly grievous when—as in this case but unlike *Lee*—the defendant's attack on the indictment is in fact not meritorious.

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Act. "Congress intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit." *United States* v. *Wilson, supra,* 420 U.S. at 337; *United States* v. *Martin Linen Supply Co.,* No. 76–120, decided April 4, 1977, slip op. 4.

Because the Criminal Appeals Act must be "liberally construed to effectuate its purposes" (18 U.S.C. 3731, 5th para.), it is not dispositive that the Act speaks of the dismissal of "one or more counts" of an indictment, while the dismissal here arguably affected only a portion of one count. The dismissal was final, and it extinguished the prosecution unless reversed on appeal.[6] The order was not interlocutory or tentative; it left nothing to be litigated between the parties. Petitioner's view would exalt form over substance, but, as the Court explained in *Martin Linen, supra,* slip op. 3 n. 4, "it is now established that the form of the ruling is not dispositive of appealability in a statutory sense." The statute's reference to a "count" of an indictment should be construed to encompass any discrete theory of liability upon which a conviction may be founded.[7]

For the reasons we discuss at pages 31–34, *infra* the prosecutor could have charged petitioner in two counts, one alleging a violation of 18 U.S.C. 1955 by conducting a numbers operation and the other alleg-

[6] Or unless a new indictment were returned.

[7] The only court other than the court below that has considered this question has held that the United States may appeal an order dismissing part of a count of an indictment. *United States* v. *Alberti,* C.A. 2, No. 76–1543, decided August 24, 1977, slip op. 5509–5511.

ing a violation of that statute by conducting a horse betting operation.[8] Since any discrete theory of criminal liability could be embodied in a separate count, it is a mere fortuity, so far as both petitioner and the purposes of the Criminal Appeals Act are concerned, whether they are so charged. There is no reason why Congress would have authorized an appeal when the prosecutor elected to use separate counts for each theory and forbidden an appeal when he made the contrary election; the interests of the defendant are the same in either event, and the appropriateness of appellate review of legal decisions is not affected by the form of the charge. We therefore agree with the court of appeals' treatment of petitioner's argument (Pet. App. 6a–7a):

> The sole practical effect of [petitioner's] narrow construction of § 3731 would be that, in such cases only, the government would be obliged to reindict the criminal defendant before attempting to reprosecute. There is no indication, either in the statute or its legislative history, that the use of the word "count" was intended either to limit the instances in which the government could appeal or to force the government, in certain instances, to reindict

[8] This does not mean, however, that the indictment actually drafted was duplicitous. See *United States* v. *Santarpio,* C.A. 1, No. 76–1178, decided June 30, 1977, slip op. 4 n. 1. An indictment may charge the commission of the same crime (here operation of a gambling ring) by different means. The indictment also could use a separate count for each means, however, and the charges would simply merge upon conviction. *Prince* v. *United States,* 352 U.S. 322; *United States* v. *Universal C.I.T. Credit Corp.,* 344 U.S. 218, 225; *Dealy* v. *United States,* 152 U.S. 539.

the criminal defendant before it could attempt to proceed against him anew. On the contrary, the legislative history indicates that Congress intended to remove all statutory barriers to government appeals and permit appeals from an unfavorable termination of a criminal charge whenever the double jeopardy clause does not prohibit further proceedings. See *United States* v. *Wilson*, 420 U.S. 332, 337–39 (1975). Noting also that the last sentence in § 3731 provides that it is to be "liberally construed to effectuate its purposes", we interpret the word "count" in the statute to refer to any discrete basis for the imposition of criminal liability that is contained in the indictment. Here, the district court effectively dismissed the portion of the indictment charging a § 1955 violation based on the defendant's alleged numbering activities. Under our construction of § 3731, therefore, this order is appealable if the double jeopardy clause does not bar a future prosecution on this charge.

Petitioner's further argument (Br. 50–52) that the order in the present case was an evidentiary ruling that cannot be appealed misses the point of the district court's decision. The court ruled that the indictment was defective on its face; it did not purport to decide whether particular evidence was "admissible" in the usual sense.[9]

[9] The error of petitioner's argument would be plain if the district court, before trial, had struck from the indictment all references to numbers betting. Such a ruling would bear only on the adequacy of the charge and would be immediately appealable (see *United States* v. *Alberti*, *supra*).

Petitioner's argument would be weightier if the United States had sought to appeal during trial, in violation of the restriction contained in the second paragraph of the Criminal Appeals Act, from the order excluding evidence that followed the district court's holding that the indictment was defective. But the United States did not take such an appeal. It appealed only from the order terminating the prosecution on the numbers theory, and that appeal is authorized by the first paragraph of the statute whether or not an appeal would have been authorized by the second paragraph.[10] The appeal is authorized because the district court's "acquittal" terminated the proceedings short of conviction, and the first paragraph, as interpreted in *Wilson* and *Martin Linen*, authorizes an appeal from any order terminating the prosecution unless the Double Jeopardy Clause bars the way.[11] We

[10] The second paragraph of the Criminal Appeals Act does not authorize appeals from evidentiary orders entered after the attachment of jeopardy and prior to verdict. But that paragraph deals only with interlocutory appeals, and the purpose of the limitation was to prevent the interruption of an ongoing trial by an interlocutory appeal. Once the trial has ended in a final judgment an appeal may be taken under the first paragraph of the Act, and the limitations on the right to appeal conferred by the second paragraph become unimportant. See also Pet. App. 6a n.5.

[11] Mr. Justice Stevens, concurring in the judgment in *Martin Linen*, contended that Congress did not authorize appeals from "acquittals." Although the Court in *Martin Linen* rejected this argument, it would not in any event apply to an appeal in the present case. The district court's order terminating the prosecution was based on a perceived defect in the indictment. For the reasons we discuss at pages 25–29, *infra*, the district court's order, although called an "acquittal," was not an acquittal but an order dismissing the indictment. The legislative history of the Criminal

therefore turn to a consideration of petitioner's double jeopardy arguments.

II

THE DOUBLE JEOPARDY CLAUSE DOES NOT FORBID A SECOND TRIAL OF PETITIONER FOR CONDUCTING AN ILLEGAL NUMBERS GAMBLING BUSINESS

Petitioner contended in the district court that the indictment was insufficient to charge him with conducting a gambling business that ran a numbers pool. The district court accepted this theory. It then "acquitted" petitioner because the evidence did not show that he had conducted a gambling business in any other way.

By persuading the court to accept his erroneous [12] contention that the indictment did not suffice to charge him with a gambling offense involving numbers, petitioner avoided any determination of the issue whether he was guilty of that offense. He contended at trial, in other words, that he never had been

Appeals Act indicates that Congress intended to authorize appeals in cases like the present one. See S. Rep. No. 91-1296, 91st Cong., 2d Sess. 7, 8–12 (1970).

[12] See page 7, *supra*. The indictment was flawed because it did not cite the correct portion of the Massachusetts statute. But this mis-citation did not hinder petitioner's defense, since the indictment charged all of the elements of the offense and, in particular, stated that petitioner had accepted and registered bets "on a parimutual number pool" (Pet. App. 16a). Because the failure to cite the correct section of a statute is not a reason to dismiss an indictment in the absence of prejudice, the mis-citation was not a fatal flaw. Fed. R. Crim. P. 7(c)(3); *Hagner* v. *United States*, 285 U.S. 427, 431.

charged with conducting a numbers gambling operation and so should not be adjudged guilty or innocent of such a crime.

Petitioner's argument has "shifted its focus, in a way not uncommon to lawsuits" (*Codd* v. *Velger*, 429 U.S. 624, 624), since the district court ruled in his favor. Petitioner now relies on the fact that, contrary to his contention to the district court, the indictment charged the operation of a gambling business involving numbers. Because the indictment charged that crime, he maintains, he may not be retried after his "acquittal" at trial (Br. 38).

There is considerable tension between petitioner's argument at trial that he was not charged with a numbers offense and his argument here that he was not only charged with but "acquitted" of that crime. But however that may be, the decisive answer to petitioner's position is that he was not "acquitted" at all. The district court simply dismissed the indictment, at his behest, on a motion filed after jeopardy had attached. This case therefore is controlled by *Lee* v. *United States*, No. 76-5187, decided June 13, 1977, and petitioner may be tried a second time without violating the Double Jeopardy Clause.

A. THE DOUBLE JEOPARDY CLAUSE ERECTS AN ABSOLUTE BAR TO A SECOND PROSECUTION ONLY IF THE FIRST ENDS IN AN ACQUITTAL

The Double Jeopardy Clause "protects against a second prosecution for the same offense after acquit-

tal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina* v. *Pearce,* 395 U.S. 711, 717. Petitioner's first trial was aborted, at his request, before a verdict of guilt or innocence was rendered by the jury. This case therefore does not present any question concerning a second prosecution after a conviction or an acquittal by the factfinder. It does, however, present the question whether petitioner may be tried a second time for the same crime.

The prohibition against multiple trials for the same offense is based upon the special interests protected by the Clause:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. *United States,* 355 U.S. 184, 187–188, quoted in *Serfass* v. *United States,* 420 U.S. 377, 387–388. See also *Breed* v. *Jones,* 421 U.S. 519; *United States* v. *Jorn,* 400 U.S. 470, 479 (plurality opinion).

Because of the special rules of finality created by the Clause, the prosecution may not retry a defendant

who has been acquitted at trial, whether or not the instructions or legal principles underlying the acquittal were erroneous. *Lee* v. *United States, supra,* slip op. 7; *Finch* v. *United States,* No. 76–1206, decided June 29, 1977; *Kepner* v. *United States,* 195 U.S. 100. But only a "verdict of acquittal at the hands of the jury [or the judge in a bench trial]" (*Forman* v. *United States,* 361 U.S. 416, 426) is an absolute bar to a second trial.[13] In any other event, whether a second trial may be held depends upon a careful balancing of the defendant's interest in avoiding repetitious trials against the public's interest in "fair trials designed to end in just judgments." *Wade* v. *Hunter,* 336 U.S. 684, 689.

With the exception of the principle that a true acquittal (not preceded by a finding of guilt) is a complete bar to reprosecution, the Court has eschewed the application of any "mechanical formula" or "rigid rules." *Illinois* v. *Somerville,* 410 U.S. 458, 462–467. A rule that a second trial for the same offense invariably violates the Double Jeopardy Clause "would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed. * * * [T]he purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying

[13] A judgment of acquittal authorized by the applicable rules and not preceded by a finding of guilt also may bar a second trial. Compare *United States* v. *Martin Linen Supply Co., supra,* with *United States* v. *Sanford,* 429 U.S. 14.

courts power to put the defendant to trial again." *Wade* v. *Hunter, supra,* 336 U.S. at 688–689. As Mr. Justice Harlan explained in *United States* v. *Jorn, supra,* 400 U.S. at 483–484, "it is clear beyond question that the Double Jeopardy Clause does not guarantee a defendant that the Government will be prepared, in all circumstances, to vindicate the social interest in law enforcement through the vehicle of a single proceeding for a given offense. * * * The determination to allow reprosecution in [some] circumstances reflects the judgment that the defendant's double jeopardy interests, however defined, do not go so far as to compel society to so mobilize its decision-making resources that it will be prepared to assure the defendant a single proceeding free from harmful governmental or judicial error."

The most important value that may be disserved by a mid-trial termination is the right of the accused "to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate." *United States* v. *Jorn, supra,* 400 U.S. at 486. But when, during the course of a trial, an accused willingly surrenders his right to receive the verdict of the factfinder, this choice removes any barrier to a second trial, unless the election was forced by judicial or prosecutorial overreaching. *Lee* v. *United States, supra; United States* v. *Dinitz,* 424 U.S. 600. *Lee* recognized that it makes no difference whether the trial judge calls the termination a mistrial or a dismissal of the indictment, and it should

similarly make no difference whether he calls it an "acquittal."

These principles of double jeopardy law support the propriety of a second trial of petitioner. He willingly surrendered his right to receive the verdict of the jury and persuaded the judge to enter an erroneous decision, based upon a mistake of law, on a technicality of pleading, wholly unrelated to the determination of guilt or innocence. If the trial had gone to verdict, there would have been no need to hold a second trial. Petitioner's choice, and his alone, is responsible for the need to hold additional proceedings in this case.

B. PETITIONER'S MID-TRIAL OBJECTION TO THE SUFFICIENCY OF THE INDICTMENT REMOVED ANY DOUBLE JEOPARDY BAR TO A SECOND TRIAL

Lee v. *United States, supra,* held that a defendant could be tried a second time after the district court dismissed the information in mid-trial in response to the defendant's argument that it failed to state an offense. *Lee* controls this case. Here, as in *Lee,* petitioner objected to the indictment on the ground that it was defective on its face. Here, as in *Lee,* petitioner persisted in his contention even though the granting of his motion prevented the return of a verdict by the factfinder. He abandoned his right " 'to go to the first jury and, perhaps, end the dispute then and there with an acquittal.' " *Dinitz, supra,* 424 U.S. at 608. Here, as in *Lee,* the fact that petitioner has not received the verdict of the factfinder is entirely a matter of petitioner's choice. Since petitioner "exercised his choice in favor of terminating the trial" (*Lee, supra,*

slip op. 9) rather than receiving the jury's verdict, he may be tried a second time now that the court of appeals has determined that petitioner was not entitled to the termination he sought and received.

There are several differences between this case and *Lee,* but in our view none of them supports a different outcome. For example, in *Lee* the charge was indeed defective, and the judge properly granted the motion to dismiss. In the present case, by contrast, there was no error at all and thus no reason to terminate the trial without submitting the case to the jury. But it would be a topsy-turvy rule that rewarded defendants with immunity from further prosecution for leading district judges into error, while subjecting to second trials defendants whose first trial was infected with an error that made dismissal appropriate. The need to try petitioner again is entirely of his own invention. If the government could retry Lee despite its negligence in drawing the original defective charge, then surely it should be permitted to retry petitioner on what always has been a sufficient charge.

Petitioner argues, however, that this case is different from *Lee* because the district judge "acquitted" him. We agree with petitioner that, under *United States* v. *Martin Linen Supply Co., supra,* if the district court acquitted him of the charge on which the United States seeks to retry him, retrial would be barred. But we do not agree with petitioner that he was acquitted, as this Court has used that term.

Petitioner's argument that he was acquitted has two parts. First, petitioner argues that the district

judge did not contemplate reprosecution (Br. 23–24 n. 6). More broadly, petitioner contends that the finding that there was no evidence to support petitioner's involvement in horse betting constituted an acquittal on the entire gambling offense (Br. 25–44). We take up these arguments in turn.

1. The district court's description of its decision as an "acquittal" is not decisive

The district court stated that it was "acquitting" petitioner. Its characterization of its decision is not, however, the last word. "The word [acquittal] has no talismanic quality for purposes of the Double Jeopardy Clause." *Serfass* v. *United States, supra,* 420 U.S. at 392. This Court always has examined the substance rather than the label of a district court's decision, and "the trial judge's characterization of his own action cannot control the classification of the action for purposes" of double jeopardy analysis. *United States* v. *Jorn, supra,* 400 U.S. at 478 n. 7. See also *United States* v. *Sisson,* 399 U.S. 267, 270, 286–287.

The Court explained in *United States* v. *Martin Linen Supply Co., supra,* slip op. 7, that "what constitutes an 'acquittal' is not to be controlled by the form of the judge's action." For the purposes of the Double Jeopardy Clause, an "acquittal" is a ruling resolving factual issues. "[A] trial court's ruling in favor of the defendant is an acquittal *only if* it 'actually represents a resolution, correct or not, of some or all of the factual elements of the offense

charged.' " *Lee* v. *United States, supra,* slip op. 6 n. 8, quoting from *United States* v. *Martin Linen Supply Co., supra,* slip op. 7 (emphasis added).

Under this standard, the district court's decision did not acquit petitioner. The court did not purport to pass upon the sufficiency of the evidence to demonstrate that petitioner had engaged in a gambling enterprise that accepted numbers bets. The district court's ruling—here, as in *Lee*—was that the indictment did not sufficiently charge the defendant with engaging in the conduct to which the evidence had been addressed. The "acquittal" here thus was equivalent to the "dismissal" in *Lee;* each was the consequence solely of the court's conclusion that the charge was defective. The district court itself said that its decision was "entered on legal grounds as opposed to containing or importing a finding of fact" (A. 49), and the court of appeals therefore properly held that "[n]either the judge nor the jury ever focused on what the evidence of numbering activities established regarding [petitioner's] conduct or on whether the alleged conduct was such that criminal liability could be imposed. Because of this fact, a future prosecution in this case will not threaten one of the principal private interests protected by the clause: the criminal defendant's interest in preserving a district court's ruling that he is not criminally responsible" (Pet. App. 8a–9a).

Petitioner responds that the district court terminated the prosecution with the expectation that it could not be reinstituted, and that this itself bars

future prosecution. This contention is not factually correct. The district court did not state or imply that further proceedings on a corrected indictment would be barred. The record is silent with respect to the court's intentions, and petitioner's argument therefore is unfounded.

In any event, there would be no reason to give controlling significance to the district judge's subjective intentions, which do not affect in any way the defendant's interests. To give conclusive force to the judge's subjective intentions would be, in effect, to give conclusive force to the label the judge attaches to his action, since the use of the label "acquittal" may simply manifest the judge's subjective conclusion that further prosecution would be barred.[14] This Court has held, however, that labels have no such dispositive significance.

Here, as in *Lee,* the termination "clearly was not predicated on any judgment that [petitioner] could never be prosecuted or convicted for the [gambling offense involving numbers]. To the contrary, the District Court stressed that the only obstacle to a convic-

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[14] It would have made no difference in *Lee*, for example, if the district judge, acting under a misapprehension that the Double Jeopardy Clause would bar further prosecution, had "acquitted" Lee or dismissed the indictment with prejudice. It would be pointless to let such assessments become self-fulfilling prophesies. The interests of the defendant in avoiding a second trial are the same whatever the judge may suppose the consequences of his decision to be, and his beliefs therefore should not affect the constitutional rules governing reprosecution. Cf. *Lee*, *supra*, slip op. 7–8 n.9.

tion was the fact that the [indictment] had been drawn improperly.[15] The error, like any prosecutorial or judicial error that necessitates a mistrial, was one that could be avoided—absent any double jeopardy bar—by beginning anew the prosecution of the defendant." *Lee, supra,* slip op. 7. The district court indicated that if the indictment had been drafted correctly the case could have proceeded; the situations in *Lee* and the present case therefore are identical.[16] The district court did not express any view

[15] In *Lee* the district judge had stated his conviction that the defendant was guilty. See slip op. 3. In the present case the district judge rejected out of hand the argument of petitioner and his co-defendants that the evidence was insufficient to allow the case to go to the jury. See A. 4: "I don't think there is any question that there is sufficient evidence to go to the jury. Do you seriously want to argue that now?" When the court later particularly evaluated the evidence pertaining to petitioner, it did not state that there was any lack of proof to connect petitioner to numbers operations; to the contrary, the court stated (A. 49) that it would have reinstated the charges against petitioner if it had accepted the prosecutor's argument that the indictment was sufficient.

[16] Petitioner relies (Br. 27–28, 35) on *Ashe* v. *Swensen*, 397 U.S. 436. But this reliance is unwarranted. Indeed, the approach we take here is similar to the approach this Court took in *Ashe* to the problem of ascertaining what issues had been decided in a prior prosecution and therefore could not be relitigated under the principles of collateral estoppel. The Court held (397 U.S. at 444) that a court must examine the record of the first trial to see what issues had necessarily been decided; if a " 'rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration' " (*ibid.*), collateral estoppel does not apply. See also *United States* v. *Adams*, 281 U.S. 202. In the present case the only issue necessarily decided was whether the evidence was sufficient to connect petitioner to horse betting activities. The district court expressed no opinion concerning the proof of numbers betting (although it denied petitioner's

that—apart from the constraints of the Double Jeopardy Clause—further prosecution of petitioner could not succeed.[17] The defect identified by the district court was an error in drafting the indictment, and the defect could have been cured by a second draft; the district court did not express any opinion on the general issue of guilt or innocence. The district court therefore has not granted a "midtrial dismissal * * * on the ground, correct or not, that the defendant simply cannot be convicted of the offense charged" (*ibid.*), and the Double Jeopardy Clause does not interdict further proceedings.[18]

motion for acquittal on evidentiary grounds (A. 4, 7, 12)). It did not resolve the general issue of guilt or innocence because petitioner had convinced the district court that the indictment did not charge any offense having to do with numbers. That issue therefore remains open for future proceedings.

[17] In our view it would not have mattered even if the district judge had been of the opinion that no prosecution could have succeeded, so long as the judge did not base that opinion on a resolution of the general issue of guilt or innocence. See our supplemental memorandum in *United States* v. *Scott*, petition for a writ of certiorari pending, No. 76–1382. It is unnecessary to reach that question here, however, because the district court did not find that, apart from the Double Jeopardy Clause, no prosecution of petitioner could be successful. (We are sending a copy of our supplemental memorandum in *Scott* to counsel for petitioner.)

[18] Two courts of appeals (in addition to the First Circuit here) have held that the Double Jeopardy Clause does not bar a second trial after an indictment is dismissed in mid-trial, even if the district judge thought the defect to be incurable. See *United States* v. *Appawoo*, 553 F. 2d 1242 (C.A. 10) (district court erroneously thought statute unconstitutional); *United States* v. *Kehoe*, 516 F. 2d 78 (C.A. 5), certiorari denied, 424 U.S. 909 (prosecution commenced under incorrect statute). These cases strongly support the position we have taken in the text.

2. The joinder of two theories of criminal liability in a single count does not make an acquittal on one theory an acquittal on both

Petitioner's major argument, which he presents in several ways, is that because he was charged in a single-count indictment with conducting but a single gambling enterprise, the district court's conclusion that he had not been tied to horse betting necessarily absolved him of criminal responsibility for that single offense, even though the district court did not address the sufficiency of the numbers evidence. It would be improper, petitioner argues, to allow the single count to be split into two theories of liability.

We disagree with this analysis. In our view, the *Lee* test should be applied separately to each independent basis of criminal responsibility. It was fortuitious, from petitioner's point of view, that he was charged in one count rather than two. If he had been charged in two counts with (1) operating a horse betting gambling ring, and (2) operating a numbers gambling ring, the proper resolution of this case would be apparent. The district court would have entered two separate judgments. It would have acquitted petitioner on the horse betting charge for failure of proof, and it would have dismissed the numbers charge because of the perceived defect on the face of the indictment. A second trial on the numbers charge would have been permitted under *Lee,* because petitioner asked the court to dismiss the numbers charge.

Petitioner's interests in avoiding that second trial are the same whether the initial charge was in one count or two. In either event petitioner exercised his choice in favor of terminating the trial; in either event the rationale of *Lee* and *Dinitz* permits reprosecution after the defendant has made such a choice to surrender his valued right to receive the verdict of the jury, and neither it nor the court has passed on the general issue of guilt or innocence.

We believe, therefore, that the propriety of a second trial in this case follows directly from *Lee* if we can establish that it would have been proper to charge petitioner in two counts rather than one. Alternatively, we submit that even if a two-count charge would have been improper, petitioner himself "split" the charge by inducing the district court to rule, over the prosecution's objection, that the indictment did not charge any numbers offense. A second trial therefore is proper under the approach adopted by the plurality opinion in *Jeffers* v. *United States,* No. 75–1805, decided June 16, 1977.

a. Petitioner could have been charged in a two-count indictment, each presenting a discrete theory of criminal liability

We agree with petitioner that Congress intended in 18 U.S.C. 1955 to authorize only a single punishment for conducting a single gambling enterprise, no matter how many state statutes the enterprise violated and no matter how many types of bets it took. The taking of numbers bets and the taking of bets on horse races were in the circumstances of this case

simply two ways to commit the same federal crime,"[19] and it was proper under Fed. R. Crim. P. 7(c)(1) to allege both in the same count of the indictment. Proof of either horse betting or numbers betting would have been sufficient to make out the commission of the gambling offense.

It does not follow, however, that it would have been improper to charge petitioner in two counts rather than one.

> [A] draftsman of an indictment may charge crime in a variety of forms to avoid fatal variance of the evidence. He may cast the indictment in several counts whether the body of facts upon which the indictment is based gives rise to only one criminal offense or to more than one. * * * [B]y an indictment of multiple counts the prosecutor gives the necessary notice and does not do the less so because at the conclusion of the Government's case the defendant may insist that all the counts are merely variants of a single offense.

United States v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 225. In other words, a prosecutor may charge a single offense in a variety of counts because it is difficult to predict which theory of liability the

[19] A more difficult question would be presented if the evidence established two different gambling enterprises (say, one running a casino and the other a numbers lottery) with some but not all venturers in common. Since the statute provides separate punishment for each gambling enterprise, it is possible to have multiple liability for conducting multiple enterprises. But the prosecution did not contend, and the indictment did not charge, that there was more than one enterprise in this case.

facts will support, because each theory of liability may raise distinct legal problems (as they did in the instant case), because separation may make the case more easily understood, or for any of a number of reasons. See also, *e.g.*, *United States* v. *Gaddis*, 424 U.S. 544, 550 (prosecutor may simultaneously charge violations of 18 U.S.C. 2113(a), (b), (c) and (d) even though only one conviction could be entered); *Pierce* v. *United States*, 160 U.S. 355 (defendant may be charged in two counts with the same murder, one count alleging use of a gun and the other the use of a blunt instrument); *Dealy* v. *United States*, 152 U.S. 539 (defendant may be charged in 17 counts with the same conspiracy, each count alleging a different overt act).

Since the prosecutor, without violating any of petitioner's rights, could have charged him in two counts with conducting the same gambling business by two different means, there would be no constitutional objection to a conviction on one of those counts just because there had been an acquittal on the other. The prosecutor would have had to present both counts for resolution in a single trial, since they stated the same offense (see *Brown* v. *Ohio*, No. 75–6933, decided June 16, 1977), but a jury would have been free to convict of one and acquit of the other. The facts may show (as they did here) that petitioner engaged in numbers betting but not horse betting.[20] Similarly, if petitioner had moved for a mis-

[20] Although a conviction on one count would bar further prosecution on the other, an acquittal would not necessarily do so, because the counts "merge" only upon conviction.

trial with respect to the numbers betting theory but had asked to submit the horse betting theory to the jury, and the judge had granted his request, he could not later argue that the jury's acquittal on the horse betting charge would block further prosecution on the theory of liability that had been removed from the case at his own request.

Because, as *Lee* establishes, a motion to dismiss the indictment on account of facial defects is the constitutional equivalent of a motion for a mistrial, it follows that this case must receive the same constitutional treatment as the examples we have just discussed.[21] Petitioner removed the numbers theory from the case on his own motion before the court acquitted him on the horse betting theory of liability. He was not acquitted on the numbers theory.

b. Petitioner is responsible for "splitting" the charge into two theories of liability

Even on the assumption that a two-count indictment would have been improper, we believe that this case should be treated as if the charges had been expressed in two counts. Petitioner, not the prosecutor, was responsible for "splitting" the charge into two discrete bases of criminal liability.

In *Jeffers* v. *United States, supra,* the defendant was charged with conspiring to violate the narcotics laws, in violation of 21 U.S.C. 846, and with conducting a continuing criminal enterprise, in violation of 21 U.S.C. 848. This Court concluded that the conspir-

[21] See note 16, *supra.*

acy was a lesser included offense of the continuing criminal enterprise and, consequently (under the reasoning of *Brown* v. *Ohio, supra*), that the two were the "same offense." It therefore assumed that they should have been prosecuted simultaneously and that the Double Jeopardy Clause ordinarily would bar successive trials. But Mr. Justice Blackmun's opinion for a plurality of the Court held that this principle did not assist Jeffers, who had opposed the holding of a joint trial. He explained (slip op. 14, footnote omitted) that "although a defendant is normally entitled to have charges on [the same] offense resolved in one proceeding, there is no violation of the Double Jeopardy Clause when he elects to have the two [charges] tried separately and persuades the trial court to honor his election."

Petitioner made such an election here. The indictment charged the existence of a single gambling offense, carried out by horse betting and by numbers betting. Petitioner persuaded the district judge, however, that there was a difference between these theories of liability and that the indictment was adequate to charge horse betting but not numbers betting. He persuaded the district court, in other words, to treat the two theories of liability as distinct offenses. He then persuaded the court to disregard the numbers theory (on a ground not related to guilt or innocence) and to acquit him on the horse betting theory. This effectively carved up the charge; petitioner obtained an acquittal on one theory of liability and what amounted to a dismissal of the indictment on the other.

The prosecutor attempted to bring all of the theories of liability on the "same offense" to trial at the same time. As in *Jeffers,* an objection interposed by the defendant frustrated a final resolution of all theories of liability at the same trial. Indeed, in at least one respect the case for a second trial of petitioner is stronger than the case for a second trial of Jeffers; in *Jeffers* the prosecutor still could have given the defendant a unified trial by severing the cases of his co-defendants (see slip op. 1 n. 3; Stevens, J., dissenting), whereas in the present case the prosecutor joined all theories of liability in a single charge, and petitioner created the occasion for a second trial by reserving his objections to the indictment until after jeopardy had attached.[22] Since petitioner did not present his objection before trial, and since at trial he insisted, erroneously, that the numbers betting theory of liability was not properly before the court, "his action deprived him of any right that he might have had against consecutive trials" (*Jeffers* plurality slip op. 16). So long as the defendant is responsible for the separation of the distinct theories of liability underlying the "same offense," he has no valid complaint when his election results in the need for another trial to resolve the issue of his guilt or innocence to the entire charge.

c. A defendant who neglects opportunities to present his legal arguments before trial may not assert a double jeopardy bar to a second trial caused by belated objections

In *Serfass* v. *United States, supra,* 420 U.S. at 394, the Court reserved decision on "the case put by the

[22] We discuss this point at greater length at pages 37–43, *infra.*

Solicitor General, of 'a defendant who is afforded an opportunity to obtain a determination of a legal defense prior to trial and nevertheless knowingly allows himself to be placed in jeopardy before raising the defense.'" This case presents such a situation. The indictment charged on its face that petitioner engaged in numbers gambling, and so any defect caused by the miscitation of the Massachusetts statute was apparent from the moment the indictment was returned. Fed. R. Crim. P. 12(b)(2) permits, if it does not require, defendants to raise such objections before trial.[23] We believe that petitioner's failure to raise his objection before trial removes any double jeopardy bar to the

[23] Rule 12 permits the raising before trial of any objections to the indictment. It requires the raising before trial of all objections other than contentions that the indictment fails to show jurisdiction or to charge an offense. Objections to the indictment may be made belatedly only for good cause shown, and even then may be decided only if no party's right to appeal will be adversely affected. Fed. R. Crim. P. 12(c) and (e). Petitioner has not contended that there was good cause for his delay, and the potential effect on the United States' right to appeal is apparent.

If a motion should have been filed before trial but was not, the objection is waived. *Davis* v. *United States,* 411 U.S. 233; cf. *Wainwright* v. *Sykes,* No. 75–1578, decided June 23, 1977. Whether there was a formal "waiver" in this case depends upon whether the objection to the indictment would, if correct, have established that it failed to state an offense. We submit that the objection was not of this sort, since the indictment set out all of the elements of the offense and was defective, if at all, only because of the mis-citation of the state statute. See Wright, *Federal Practice and Procedure: Criminal* § 193 (1969) (formal errors must be raised before trial or be deemed waived). But the presence or absence of formal "waiver" is, in our view, unimportant, because the timing of the objection operates in any event to extinguish any double jeopardy objection to a second trial.

holding of any further proceedings that may be required by his tardiness.[24]

When an objection to an indictment is raised before the trial, the district court has ample time (which it lacked here) to study the objection and come to a considered decision.[25] If the court identifies a flaw in the indictment, it may be amended before trial; if the court rejects the defendant's arguments, the trial can proceed with the legal issue settled; and if the court should incorrectly dismiss the indictment, the United States could appeal before trial under 18 U.S.C. 3731. See *Serfass* v. *United States, supra.* All of these possibilities would avoid any need for two trials. The need for a second trial could arise only if the court were to reject a well-founded objection; in that event, however, the jury might acquit, and if it were to convict a second trial could be held without offending the Double Jeopardy Clause. See *Abney* v. *United States,* No. 75–6521, decided June 9, 1977, slip op. 14; *United States* v. *Tateo,* 377 U.S. 463.

[24] The United States raised this argument in the court of appeals (Br. for Appellant 21–23), although that court found it unnecessary to consider it (see Pet. App. 9a–10a and n. 7). We present the argument again here because the United States "as respondent may make any argument presented below that supports the judgment of the lower court." *Hankerson* v. *North Carolina,* No. 75–6568, decided June 17, 1977, slip op. 6 n. 6. This argument supports the judgment of the court of appeals even if this Court should disagree with our previous submission, that a second trial may be held under the principles of *Lee* and *Dinitz.*

[25] Cf. *Lee* v. *United States, supra,* slip op. 11 (remarking that the "last-minute timing" of the motion to dismiss made it reasonable to defer disposition until the court had an adequate opportunity to research the defendant's contentions).

Lee and *Dinitz* hold that the most important value that might be disserved by a mid-trial termination in advance of a resolution of the general issue is the right of the defendant to obtain the verdict of the factfinder. That interest, and the related interest in avoiding a second trial, are so strong that "manifest necessity" is required to abort a trial over a defendant's objection. But different principles apply when a defendant does not want to receive a verdict; if he himself seeks a termination, that request is sufficient to authorize both the termination and a second trial, There is no need for special justification to "deprive" a defendant of a verdict he does not want to receive. When the defendant exercises control over the course of the trial and elects to terminate the proceeding, a second trial may be held.

Defendants may exercise such control not only by asking for a mid-trial termination (as in *Lee* and *Dinitz*) but also by determining the timing of the requests they make. Petitioner exercised both sorts of control here; by waiting until jeopardy had attached before objecting to the sufficiency of the indictment, petitioner influenced the course of proceedings and subjected himself to an unnecessary jeopardy.

There can be no reasonable doubt that petitioner knew about the statutory mis-citation in advance of trial. Pretrial proceedings had consumed three years, and "[m]otions of every kind and description were brought over that period" (A. 43). When the district court asked petitioner's counsel why the objection to the indictment had been made only after six days of

trial, counsel responded that his objections "did not ripen" (A. 44) until the prosecutor asked the court to take judicial notice of the text of the state statute. Counsel continued (*ibid.*): "If the Court had been asked [to take judicial notice] at the beginning of the trial, I planned to raise it then. I expected, actually, that it [would] be asked at the beginning of the trial, but it was not."[26] Counsel's concession that she had "planned" to raise the issue at the beginning of trial implies that counsel was aware before trial of the grounds of the contention and that he deliberately delayed raising those grounds until jeopardy had attached.

We submit that the Double Jeopardy Clause does not bar a second trial when the defendant subjects himself to an unnecessary jeopardy before raising objections to the sufficiency of the charge. See *United States* v. *Kehoe,* 516 F. 2d 78 (C.A. 5), certiorari denied, 424 U.S. 909.[27] Whether the making of a be-

[26] On hearing this explanation the district court remarked (A. 44): "I don't follow that. I don't think that's right at all."

[27] In *Kehoe* the defendants were charged with embezzling land from a federally-insured savings institution. They did not contend before trial that embezzling land is no offense. After the prosecution had presented its evidence, however, defendants argued that real property may not be the subject of embezzlement. The district court agreed and "acquitted" them. Defendants were then charged and convicted of making false entries in the records of a federally-insured institution, and they contended that the Double Jeopardy Clause barred their second trial. The court of appeals disagreed and held (516 F. 2d at 86; footnote omitted) that "a defendant who for reasons of trial tactics delays until mid-trial a challenge to the indictment that could have been made before the trial—and before jeopardy has attached—is not entitled to claim the protection of the double jeopardy clause when his objections to the indictment are sustained" and he is later tried on a proper charge.

lated claim is viewed as a "waiver" of a plea of former jeopardy or, perhaps more accurately, simply as a consent to a belated disposition of the objection, does not matter. The central point is that the Double Jeopardy Clause's special rules of finality should not extend to defendants who withhold arguments until jeopardy attaches. There is no reason why a clever defendant should be allowed to transmute a drafting error (or his ability to persuade the district court that there has been a drafting error) into immunity from prosecution merely by delay in calling the matter to the court's attention. One commentator has expressed the matter well (Note, *Double Jeopardy and Government Appeals in Criminal Cases,* 12 Colum. J. L. & Soc. Probs. 295, 343–344 (1976)):

> When jeopardy attaches only as a result of the defendant's delay, jeopardy could have been completely avoided had the defendant moved to dismiss at the proper time. It [is] thus the defendant who "effectively (and unnecessarily)" placed himself in jeopardy * * *. * * * [T]he subsequent trial is in effect the * * * only one that the defendant would have undergone, but for his own deliberate choice of dilatory tactics. * * *
>
> The gravamen of this approach is the defendant's voluntary assumption of jeopardy in the proceedings leading to dismissal. * * * The double jeopardy clause's ban on retrials is designed as a brake on state power and as a curb on the number of times the state, with all its resources, can present its proofs in an attempt to convict. It is designed to curb prosecutions

> at the Government's behest, not prosecutions which, for tactical reasons, the defendant voluntarily chose to undergo and which the defendant could legitimately and easily have avoided. * * * [W]here the defendant allows himself to be placed in jeopardy in order to cut short the prosecution, the Government [should] have one chance at a complete trial * * *.

No legitimate interest of the accused is served by allowing him to accept an unnecessary attachment of jeopardy only to seek thereafter to prevent an adjudication on the merits of the charge. A defendant who does so will not be put to trial twice at the government's behest. Moreover, the prosecutor has no opportunity in such circumstances to manipulate events or harass the defendant; indeed, any "manipulation" is the defendant's choice, not the prosecutor's. The defendant is not deprived of his opportunity to submit his case to the jury and to receive its verdict; to the contrary, the defendant in such cases begins the trial with the intent to avoid any such submission, and the termination of the trial could not "deprive" him of something he does not seek.[28]

[28] The case is more difficult where a defect apparent on the face of the indictment might be characterized alternatively as a drafting problem or as a reason why the defendant in fact committed no crime. In such cases the defendant arguably should be entitled to await the government's proof and then to argue that the facts proved do not make out any crime. But where, as here, the only problem is one of technical draftsmanship, there is no reason why a defendant has a legitimate interest in allowing jeopardy to attach before drawing the defect to the court's attention. After all, the only reason for requiring technical adequacy in an indictment is to ensure that the defendant is not prejudiced by lack of adequate notice of the charges. A defendant who is aware of the defect is, by that token, in a position to obtain any necessary clarification prior to trial, and it is difficult to understand what (other than the manufacturing of a double jeopardy defense) the defendant could legitimately gain by keeping knowledge of the defect to himself until after jeopardy has attached.

By delaying raising his objection to the indictment, petitioner capitalized on a formal mis-citation that easily could have been cured before trial and that, as the court of appeals later held, was no error at all. Yet petitioner turned that mis-citation into the termination of a six-day trial, and he now contends that because he led the district court into error he may not be reprosecuted. The timing of petitioner's motion profoundly influenced the course of this case, and it generated proceedings and legal disputes that would have been unnecessary if petitioner had raised his contention at the proper time. Petitioner converted a drafting foible into the dismissal of the case against him.

We submit that the Double Jeopardy Clause does not require that this be the end of the matter. Petitioner's delay was a matter of his choice, and he had it within his power to obtain a decision at a time long before any values protected by the Double Jeopardy Clause were implicated. Having made the decision that his interests were best served by raising his contentions well into the trial, petitioner should not be entitled to complain that, because of the timing of his motion, the error he induced the district court to commit cannot now be corrected without holding another trial.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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